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No. 182

IN THE

Supreme Court of the United States

October Term, A. D. 1955

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Petitioner,

vs.

RUTH ELAINE ALLENDORF, as Special Administratrix of the Estate of James Dale Allendorf, Deceased,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS FOR REVIEW

1. Can a state constitutionally refuse jurisdiction to its courts to hear actions under the Federal Employers' Liability Act for deaths occurring outside the state when those courts have jurisdiction to hear actions for out-of-state deaths brought under the wrongful death statutes of other states?

2. Did it constitute reversible error, in all the circumstances of the case, to permit an actuary to testify as to the present worth for a given period of a sum which the jury could have found to be the expected contributions per year of the deceased to his wife and his minor children?

ARGUMENT

I. The Illinois Statute Was Correctly Held to Be An Unconstitutional Discrimination Against a Federally-created Cause of Action.

In 1903 Illinois enacted a statute (Pet. 4) which purports to deprive the courts of that state of jurisdiction to hear certain actions for deaths which occurred outside the state. *Ill. Rev. Stat., c.* 70, §2. In 1951 this Court held that a very similar Wisconsin statute was invalid in so far as it applied to actions for out-of-state deaths brought under the wrongful death statute of another state; this result was required by the Full Faith and Credit Clause of the United States Constitution. *Hughes v. Fetter*, 341 U.S. 609 (1951). That decision was followed one year later in a case involving the very Illinois statute here in question. *First National Bank of Chicago v. United Airlines*, 342 U.S. 396 (1952). These decisions are not challenged by petitioner. The present state of the law, as it applies to the statute here in question, was summarized by the Illinois Supreme Court in the present case:

> "It is clear that a State can no longer refuse to entertain wrongful death actions which originate under the laws of a sister State, if, like Illinois, it entertains such actions when they arise under its own laws. Section 2 of our Injuries Act has thus been limited to apply only to suits arising under the laws of the United States or of a foreign country. As a practical matter, this means that it applies only to cases arising under the laws of the United States." (Pet. App. 3.)

Thus the question posed by the present case is whether a state which entertains actions for out-of-state deaths where suit is brought under a state wrongful death act can refuse to hear such actions where suit is under the Federal Employers' Liability Act. Two separate lines of authority in

this Court indicate, as held by the Illinois Supreme Court, that a state statute with such an effect is invalid as repugnant to the Supremacy Clause of the United States Constitution.

Soon after the passage of the FELA, this Court held that state courts were bound to entertain suits under that Act when their ordinary jurisdiction is appropriate for such suits. *Mondou v. New York, N. H. & H. R. Co.*, 223 U.S. 1, 56-7 (1912). The Illinois courts, like the Connecticut courts involved in the *Mondou* case, are courts of general jurisdiction. Every day they hear death actions, many of which arise from deaths occurring outside Illinois. Every day they hear personal injury actions for injuries inflicted outside the state, whether the suit is brought on common law grounds or under the FELA. They are perfectly competent to adjudicate a death claim under FELA though the death occurred in some other state. The only barrier to such an adjudication is the statute which purports to withdraw jurisdiction of this class of cases. The problem was anticipated, in a case involving the identical Illinois statute, by Justice Holmes when he made the oft-quoted statement that:

> "* * * it is plain that a State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent."

Kenney v. Supreme Lodge of the World, 252 U.S. 411, 415 (1920). Without more the Illinois statute conflicts with the supremacy clause and is unconstitutional in so far as it seeks to deny jurisdiction to otherwise competent courts to hear claims under FELA for out-of-state deaths.

The statute can equally well be held unconstitutional as a palpable attempt to discriminate against a Federally-created right solely because of the Federal nature of that

right. The authoritative construction of the statute by the court below is that:

> "As a practical matter, this means that it applies only to cases arising under the laws of the United States." (Pet. App. 3.)

For practical purposes the statute, as construed and applied, is identical with the statute involved in *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U.S. 230 (1934). That case involved an Alabama statute which gave the courts of that state jurisdiction over suits for wrongs which occurred in another state brought pursuant to the common law or statutes of such other state. The Alabama court held that the statute did not authorize suit under a Federal statute for an out-of-state wrong, and refused to entertain an FELA suit for an injury which occurred in Tennessee. A unanimous Court, speaking through Justice Brandeis, held that as so construed, the statute was unconstitutional, and required Alabama to hear the suit:

> "While Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers' Liability Act, * * * the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a Federal law. The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a Federal act. A state may not discriminate against rights arising under Federal laws."

Id. at 234.

The *McKnett* case has been frequently cited by this Court, always with approval. It controls the present decision. The result for which petitioner contends would mean that if a passenger and an employee are killed in a crash in Gary, Indiana, the action for the death of the passenger, brought under FELA, could not be heard in Illinois. This would be

exactly that "denial of jurisdiction * * * based solely upon the source of the law sought to be enforced" condemned in the *McKnett* case. It would be a case where, as said also in *McKnett,* "the plaintiff is cast out because he is suing to enforce a Federal act." Illinois lacks constitutional power to make such a discrimination.

Petitioner claims that the result below conflicts with the decisions of this Court in *Douglas v. New York, N. H. & H. R. Co.,* 279 U.S. 377 (1929); *Missouri ex rel Southern Ry. Co. v. Mayfield,* 340 U.S. 1 (1950), and *Ex parte Collett,* 337 U.S. 55 (1949). To the extent that these cases are in point, they support the result below. All three cases deal with the availability of the doctrine of *forum non conveniens,* by which a court under certain circumstances has discretion to refuse to hear suits properly within its jurisdiction. Our case concerns a complete denial of jurisdiction, without any scope for discretion, in suits under the FELA.

In the earliest of these cases, Justice Holmes said:

> "It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty."

Douglas v. New York, N. H. & H. R. Co., 279 U.S. 377, 387-8 (1929). And in the *Mayfield* case, 340 U.S. 1, at 4, the Court held that a state is free to adopt the discretionary doctrine of *forum non conveniens* provided that it

> "enforces its policy impartially, see *McKnett v. St. Louis & S. F. R. Co.,* 292 U.S. 230, so as not to involve a discrimination against Employers Liability Act Suits * * *."

But the Illinois policy contained in §2 of the Injuries Act cannot be enforced by that state against suits under death acts of sister states. Its only possible operation, as the Supreme Court of Illinois has noted, is to "cases arising under the laws of the United States."

The present case has nothing to do with *forum non conveniens*. It has to do only with whether a state can deny jurisdiction to otherwise competent courts to hear actions under a Federal statute when the courts are allowed to hear similar actions under state statutes. The result below, that a state cannot constitutionally do this, does not conflict with any decision of this Court. It is compelled by a long line of such decisions, from *Mondou* through *McKnett* down to *Mayfield*. The result below is correct, and raises no issue not already well settled in this Court's books. It does not merit review here.

II. The Decision Below That the Admission of Certain Actuarial Testimony Did Not Constitute Prejudicial Error Presents No Question Justifying Review Here.

If, as petitioner contends, the court below had "squarely held that as a matter of law the pecuniary loss to a widow and minor dependents must be based on the decedent's gross earnings, less only his purely personal expenditures, extending over his entire life expectancy" (Pet. 22—see also Pet. 3, 24), such decision might well justify review by this Court. But no such issue was before the Illinois Supreme Court and it made no such holding.

The present case contains no issue as to the measure of damages. Instruction No. 17 (Pet. App. 9-10) properly told the jury that plaintiff should be awarded compensation for the pecuniary loss sustained by the dependents. The jury was told that in determining this amount they should consider the present value of "the amount of money which you find from the preponderance or greater weight of the evidence that it is reasonably certain he would have contributed to his wife in the future and to the children during their minority." Thus the trial court was careful to follow the rule as

to damages laid down by this Court in *Michigan Central R. R. Co. v. Vreeland,* 227 U.S. 59 (1913), and in *Kansas City Southern Ry. Co. v. Leslie,* 238 U.S. 599 (1915). The case last cited held that it was error to instruct the jury that damages are to be determined by deducting from the gross income of the deceased an arbitrary amount for his personal expenses. The instruction properly condemned in the *Leslie* case would have allowed the jury to award the "net earnings," consisting both of the sum contributed to the dependents and of whatever amount the deceased was able to save. But in our case the instruction limited the jury to the "contributions," and the evidence was directed solely to that issue. The unchallenged testimony was that Allendorf cashed his paychecks and turned the proceeds over to his wife. She then gave him an allowance of approximately $50 a month for his own use (Abst. 93-94). The average amount turned over to the wife was $428.09 per month, and thus the amount retained by the wife was $378.09 per month. It was for the jury to determine whether this is the amount which it is reasonably certain Allendorf would have contributed to his wife in the future and to the children during their minority, or whether the contributions were some larger or smaller sum.

Nor is there any issue as to the period for which the pecuniary loss of decedent's children is to be included in the damages. Petitioner's assertion that the court below held that, as a matter of law, damages must be based on contributions to his minor dependents during his entire lifetime rather than during their minority (Pet. 8, 25-26) can most generously be described as a misreading of the record.

In Instruction No. 17, the basic instruction on damages, the jury was told three separate times that they should award such sum as would compensate for the pecuniary loss of the widow "in the future" and that of the children "during their

minority" (Abst. 215—Pet. App. 10). Further, as is shown by the transcript, which may properly be adverted to in appellate proceedings in Illinois, respondent's counsel was scrupulous, in his argument to the jury, to point out that they must limit recovery in so far as the children were concerned to the period of their minority (Tr. 796, 800-801). Petitioner claims that the decision below conflicts, on this point, with *Norfolk & W. R. Co. v. Holbrook*, 235 U.S. 625 (1915); *Chicago, B. & Q. R. Co. v. Kelley*, 74 F.2d 80 (8th Cir. 1934), and *Thompson v. Camp*, 163 F.2d 396 (6th Cir. 1947), cert. denied 333 U.S. 831 (1948). Those decisions hold that the jury must be instructed to limit recovery for minor children to their minority. The jury was so instructed. Petitioner's contention here is so utterly without merit that the Illinois Supreme Court did not feel compelled even to discuss it in that court's two exhaustive opinions in this case.

Neither in the court below nor here was there any valid issue as to the measure of damages. Instead, the issue has been as to the proof offered in support of such damages. Specifically, petitioner objected below and objects here to the admission of actuarial testimony as to the present worth of $378.09 for the period until Allendorf would have been 65 years old.

The case of *Wetherbee v. Elgin, J. & E. Ry. Co.*, 191 F.2d 302 (7th Cir. 1951), cert. denied 346 U.S. 867 (1953), on which petitioner puts much reliance, is not in point. There it was held reversible error to have allowed actuarial testimony as to the present worth of decedent's gross earnings. We do not dispute that holding, for, as the Seventh Circuit said,

> "he could not properly be permitted to use as the basis for his calculations, figures or elements which the jury could not use. The only figure the jury was authorized

> to use to reduce to its present cash value was the pecuniary benefits which the beneficiaries might reasonably have received from decedent."

Id. at 311. But in our case the actuary testified as to the present worth, not of the gross earnings, but of the contributions which, on the evidence, the jury could find that decedent would have made. The actuarial testimony was based, then, on the very measure which the jury is required to use, and assumed a figure which the jury could reasonably have found.

It has long been well settled that the jury is entitled to assistance in determining present worth. *Vicksburg & M. R. Co. v. Putnam,* 118 U.S. 545, 554 (1886). In FELA cases it is left to the law of the forum to decide whether this assistance should be by admission of interest and annuity tables or by testimony of an actuary. *Chesapeake & O. Ry. Co. v. Kelly,* 241 U.S. 485, 491 (1916). The Illinois Supreme Court, exercising a choice thus left open to it, determined upon a middle course. It held that actuarial testimony is admissible, but that the proper method is for the actuary to use neutral figures, rather than for him to assume a particular amount of contributions or a particular period of time (Pet. App. 13). It feared that assumptions of this sort might carry the danger that the jury would be misled, and would give probative weight to the particular choices made by the actuary.

We have arrived, at last, at the narrow point which petitioner tenders to this Court for review. Within the area of choice left to the states by *Chesapeake & O. Ry. Co. v. Kelly,* 241 U.S. 485, 491 (1916), Illinois could have determined that the actuarial testimony below was the proper way to prove present worth. It chose rather to approve a more limited use of actuarial testimony. The only issue which could possibly remain for scrutiny by this Court is petitioner's

claim that, having held that the kind of testimony admitted by the trial court gives rise to a danger that the jury might be misled, the Illinois Supreme Court should therefore have reversed and ordered a new trial even though it found, in the particular case, that the jury had not been misled. This would be a remarkable issue indeed for review by a Court which has expressly left it to the states to determine how present worth is to be proved, and which has further held that:

> "Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act."

Lavender v. Kurn, 327 U.S. 645, 654 (1946).

As the court below pointed out, petitioner anticipated the danger thought to be present in the kind of actuarial testimony used in this case, and took effective steps to guard against that danger (Pet. App. 13). Instructions Nos. 12 and 29 (Pet. App. 9, 11), given at the instance of petitioner, were appropriate cautions against allowing conclusive effect to this testimony. And, as the court below said:

> "on cross-examination of Miss Young, it was thoroughly developed that she did not mean to be saying what amount in dollars the plaintiffs would have received had decedent lived, nor for what period of time they would have received the same." (Pet. App. 13.)

Finally, the assumptions made by the actuary were needlessly favorable to petitioner: the jury might well have found that in the ensuing 40 years decedent's contributions to his dependents would have increased—compare *Neese v. Southern Ry. Co.*, 350 U.S. 77 (1955), reversing 216 F.2d 772 (4th Cir. 1954)—and it might have found that his contributions would not have ceased at age 65 when his expectancy was 68.21 years (Pet. App. 16-17).

The Supreme Court of Illinois, weighing all these factors, concluded that the jury had not been misled, saying:

> "It is our opinion that the result in this case would have been no different even had the actuary employed neutral figures in her testimony." (Pet. App. 18.)

The lower court's judgment on this point, turning as it does on the particular circumstances of a particular case, scarcely seems to be the sort of matter which this Court will wish to review. The conflicts petitioner claims to have discovered between the present case and decisions of this Court and the Courts of Appeals (Pet. 19) are non-existent. Recovery here was limited to "contributions" rather than "net earnings," thus meeting the requirements of *Kansas City So. Ry. Co. v. Leslie,* 238 U.S. 599 (1915). Recovery for the pecuniary loss of decedent's children was limited to the period of their minority, as required by *Norfolk & W. R. Co. v. Holbrook,* 235 U.S. 625 (1915); *Chicago, B. & Q. R. Co. v. Kelley,* 74 F.2d 80 (8th Cir. 1934), and *Thompson v. Camp,* 163 F.2d 396 (6th Cir. 1947), cert. denied 333 U.S. 831 (1948). Finally, the actuarial testimony was based entirely on calculations, figures and elements which the jury could adopt in the computation of damages, as required by *Wetherbee v. Elgin, J. & E. Ry. Co.,* 191 F.2d 302 (7th Cir. 1951), cert. denied 346 U.S. 867 (1953). In addition—though respondent does not concede that the *Wetherbee* case or any other authoritative case has so held—the proof of damags met the tests which petitioner reads into the *Wetherbee* opinion, in that it was confined to Allendorf's "work expectancy" rather than his life expectancy, and in that federal income taxes were deducted and the jury was instructed that the award was not subject to tax (Pet. App. 17).

In short, we have here no conflict with controlling decisions nor question of importance in the administration of a Federal statute. We have, rather, only another of the many cases in which a railroad, having inflicted a great loss on the family of its employee, will grasp at any straw to delay paying that family a moderate sum as compensation for the loss.

CONCLUSION

The issue here as to the constitutionality of the Illinois statute is well settled by nearly half a century of decisions in this Court. And the holding below as to damages represents merely a routine application of well-understood principles.

The petition for a writ of certiorari should, for the foregoing reasons, be denied.

Respectfully submitted,

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Petitioner's Reply Brief

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I.

REPLY TO RESPONDENT'S POINT I.

1. The Mondou case distinguished.

The respondent relies upon *Mondou* v. *New York, N. H. & H. R .Co.*, 223 U.S. 1, 56-7. But that case held only that actions under the Federal Employer's Liability Act might

be maintained as of right in state courts only "where their jurisdiction, as prescribed by local laws, is adequate to the occasion." But when the present Federal Employer's Liability Act was enacted, April 22, 1908, the jurisdiction of Illinois state courts, as prescribed by Illinois law, was *not* "adequate to the occasion." Since the amendment of May 13, 1903 (Laws of Ill. 1903, p. 217, §1; and see the Historical note to Smith-Hurd Ill. Ann. Stat., Ch. 70, §2), the Illinois courts had had no jurisdiction of *any* out-of-state death action. "The general rule, bottomed deeply in belief of the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them". Hart: The Relations Between State and Federal Law, 54 Col. L. Rev. 489, at 508 (1954); Frankfurter, J., concurring in *Brown* v. *Gerdes,* 321 U. S. 178, at 189. When Congress sought to avail itself of the courts of Illinois for the enforcement of the newly-enacted statute, it found them wholly lacking in jurisdiction of a cause of action for wrongful death occurring outside Illinois.

It is no answer to say, as respondent does, that every day Illinois courts hear death actions, many of which arise from deaths occurring outside Illinois. (Resp. brief, p. 3) After the decisions in *Dougherty* v. *American McKenna Co.,* 255 Ill. 369; *Walton* v. *Pryor,* 276 Ill. 563, and *Wall* v. *Chesapeake & O. Ry. Co.,* 290 Ill. 227, the last of which was decided in 1919, Illinois courts heard *no* out-of-state death cases until after this Court's decision in *First Nat'l. Bank* v. *United Air Lines,* 342 U.S. 396, on March 3, 1952, *the very day of Allendorf's death.* (Abst. 2) We believe that this is the first out-of-state death case to be tried in an Illinois court in nearly forty years, and it is certainly the first to reach a reviewing court since 1919. The argument that Illinois courts are experienced in the trial of such cases, although relied upon in the first opinion below, was *not* relied upon in the final opinion of the Illinois Supreme Court.

2. The McKnett case distinguished.

Nor is the statute "a palpable attempt to discriminate against a Federally-created right" so as to invoke the principle of *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U.S. 230. In that case, by an amendment the Alabama legislature had authorized suits against foreign corporations where the cause of action arose under the laws of another state, but not when the cause of action arose in another state, but under federal law. As construed by the Alabama court, the statute as amended was a direct and intentional discrimination against a Federally-created right.

Here the Illinois statute attempts no such discrimination. The language of the *proviso* applies to all death actions arising outside of Illinois, without regard to whether the action arises under state, federal or foreign law. For more than fifty years, the courts of Illinois so construed the statute and applied it impartially. The validity of similar statutes has repeatedly been sustained. *Chambers* v. *Baltimore & O. R. Co.*, 207 U.S. 142; *Loftus* v. *Pennsylvania R. Co.*, 107 Ohio St. 352, 140 N. E. 94; see 158 A.L.R. 1029-1031 and 39 Yale L. J. at 396. In *Herb* v. *Pitcairn*, 324 U.S. 117, this Court expressed no doubt as to the power of Illinois to limit the jurisdiction of a city court to actions arising within its territorial boundaries, and to apply that restriction to F.E.L.A. cases. We submit that it follows that a state may validly limit the jurisdiction of its circuit courts to actions arising within the territorial boundaries of the state. Again we point out that in *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U.S. 377, this Court, speaking through Mr. Justice Holmes, held that the Federal Employer's Liability Act "does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so" and that "there

is nothing in the Acts of Congress that purports to force a duty on such courts as against an otherwise valid excuse." In twenty-seven years since that decision, neither the Congress nor this Court has ever declared any contrary federal policy with respect to F.E.L.A. cases which, under the Supremacy Clause would override state policy.

In a comment on the *Douglas* case in 39 Yale L. J. 388, the author points out that "an otherwise valid excuse" for refusing to entertain out-of-state F.E.L.A. cases is "as a means of controlling the abuses of imported litigation." In the briefs on rehearing we pointed out to the court below that statistics released by the Association of American Railroads disclose that in the period from September 1, 1952, to March 31, 1955, a period of 31 months, more than 62-½% of all F.E.L.A. claims in the entire country were concentrated in the hands of 18 law firms in 12 cities in 8 states. (Supplemental Brief on Rehearing, pp. 3-5) More recent statistics, to the end of 1955, indicate that these 18 law firms now handle 71% of the F.E.L.A. claims. Significantly in three of those states—California, Minnesota and Utah—the highest courts have recently adopted the doctrine of *forum non conveniens* as applied to out-of-state F.E.L.A. cases overruling prior decisions to the contrary. *Price* v. *Atchison, T. & S. F. Ry. Co.,* 42 Cal. 2d 577, 268 P. 2d 577, 268 P. 2d 457; *Johnson* v. *Chicago, B. & O. R. Co.,* 243 Minn. 58, 66 N. W. 2d 763; *Mooney* v. *Denver & R. G. R. Co.,* 118 Utah 307, 221 P. 2d 628. These decisions, and others in Oklahoma, South Carolina and Georgia, and the earlier decisions in New York and Ohio cited in the petition here and in the annotation in 43 A.L.R. 2d 744, constitute the significant "interplay of judicial decisions" which should have controlled the decision below.

The only basis upon which the Court below that the Illinois statute discriminated against F.E.L.A. cases was that since this Court's decisions in *Hughes* v. *Fetter,* 341 U.S.

609, and *First Nat'l. Bank* v. *United Air Lines,* 342 U.S. 396, "as a practical matter * * * [the Illinois statute] * * * applies only to cases arising under the laws of the United States." (App. p. 3) Obviously the statute also applies to death cases arising under the laws of other nations, a not inconsiderable factor today with transcontinental railroads and world-wide air line and steamship operations. For example, Chicago newspapers listed approximately 100 Chicago area residents as passengers in The S.S. Stockholm—S.S. Andrea Doria collision. But the restricted application of the Illinois statute results only from this Court's decisions, not from any policy declared by Illinois. The Illinois court has confused an unintended difference in result, because of a difference in constitutional provisions, with an intentional discrimination. Illinois never established "a denial of jurisdiction * * * based solely upon the source of the law sought to be enforced" as in the *McKnett* case; Illinois sought to lay down a uniform non-discriminatory policy, and it followed that policy for more than fifty years. Only this Court's decisions in the *Hughes* and *United Air Lines* cases causes any difference in the treatment given in Illinois courts to out-of-state litigation. We submit that this Court cannot create a discriminatory policy for Illinois and then hold that policy unconstitutional.

II.

REPLY TO RESPONDENT'S POINT II.

1. The instructions given do not cure the error in admitting the improper actuarial testimony.

Respondent does not attempt to sustain the holding below that the admission of the actuary's calculations, while erroneous, was not prejudicial error because the error was "counter-balanced" by other restrictive factors in the bases for the calculations. Instead, respondent argues that the jury were correctly instructed as to the proper measure of damages and hence the error was made harmless.

But the rule is well settled, in Illinois and elsewhere, that error in the admission of evidence relating to damages is not cured by correctly instructing the jury as to damages. The Illinois rule is stated in *McCormick* v. *Decker,* 193 Ill. App. 451, at 453, syllabus No. 3. A more complete statement of the basis for the rule is found in *Silver King Mining Co.* v. *Kendall,* 23 Ariz. 39, 201 Pac. 102, at 104:

> "It is further contended that the error was cured by the instructions. It is true that the court correctly instructed the jury as to the proper measure of damages when he advised it that the amount of recovery was limited to compensation; that is, to the actual loss suffered by appellee as a proximate and direct result of the accident causing the injury. The husband and father himself being the plaintiff, the loss sustained by the wife and child was not an element of damage, though in a death case, where the action is prosecuted for the benefit of the widow and children, their loss is measured by his worth to them as a husband and father would be the guide. The admission of this evidence, however, justified the jury in considering it, as well as all the other testimony in the case, in arriving at its verdict. Who can say, then, what effect the child and its need of care and an education may have had on the result? As stated by the Supreme Court of Illinois in *Pittsburgh, etc., R. Co.* v. *Powers,* 74 Ill. 341:
>
> > 'It is impossible for us to know what portion of the verdict in this case was allowed because appellee had a family. The evidence was before the jury for the purpose of enhancing the damages, and we have no doubt it produced that result.'
>
> "The error, perhaps, could have been cured by cautioning the jury in its instructions against increasing the amount of the verdict on account of the plaintiff's having a wife and child, and that he had supported them up to the time of the injury. Nowhere, however, was the jury admonished to disregard this evidence, though doubt as to its admissibility was expressed by the court at the time it was offered. The

failure to do this, however, even though the instructions were otherwise correct, is ground for a reversal of the judgment. *Galion* v. *Lauer*, above; *Kinsley* v. *Morse*, 40 Kan. 577, 20 Pac. 217; *Central Passenger Ry. Co.* v. *Kuhn*, 86 Ky. 578, 6 S.W. 441, 9 Am. St. Rep. 309; *Vosburg* v. *Putney*, 78 Wis. 84, 47 N.W. 99."

See also *Ensign* v. *Southern Pacific Co.*, 193 Cal. 311, 223 Pac. 953; *Ernshaw* v. *Roberge*, 86 N.H. 451, 170 Atl. 7; *Murdock* v. *Biery*, 269 Pa. 577, 112 Atl. 772.

2. The actuary's calculations were not made in accordance with rules stated in the instructions.

So here, the actuarial testimony was adduced by the plaintiff "for the purpose of enhancing the damages" and from the amount of the verdict, we may properly conclude "no doubt it produced that result." But the instructions to which counsel refer vitiate his whole argument. True, the jury were instructed that the pecuniary loss of the children was limited to the period of their minority, but the actuary's calculations were not so limited; those calculations projected the same amount of contributions for 464 months, or until the children would be 40 and 42 years of age. The necessary effect of the decision below is that the court approved this projection *as a matter of law* in holding there was no prejudicial error in permitting the actuary to project present assumed contributions to age 65 because he should have been permitted to make calculations for the entire life expectancy.

Again it is true that the jury were instructed to consider the decedent's contributions to his dependents, rather than gross earnings less his personal expenses, as in the *Leslie* case, 238 U.S. 599. But the figure which the actuary used as the basis for his calculations was gross earnings, less only $50 per month for personal expenses and estimated federal income tax withholdings, and the Illinois

Supreme Court specifically held the tax withholdings should not have been deducted. The rule of recovery thus approved by the decision below is gross-earnings-less-personal-expenses, the very measure condemned by the *Leslie* decision. It is immaterial that in the *Leslie* case the error presented itself in instructing the jury how they might calculate damages whereas here the error is in permitting the actuary to make the calculations for them. As the Court of Appeals pointed out in *Wetherbee* v. *Elgin, J. & E. Ry. Co.,* 191 F. 2d 302, 311, speaking of the actuary's calculations:

> "His testimony of his calculations was merely to assist the jury on the matter of computing, and he could not properly be permitted to use as the basis for his calculations, figures or elements which the jury could not use."

Respondent seeks to distinguish the *Leslie* case on the ground that the instruction given there would have allowed the jury to award both "the sum contributed to the dependents" and "whatever amount the deceased was able to save." But the actuary's calculations here included Allendorf's savings—his payments into a credit union, his insurance premiums(which we are constantly reminded are one form of savings) and his payments on his house (which is a capital investment). (Abst. 94-95) Contrary to the instructions given by the trial court which limited recovery to contributions, the Illinois Supreme Court held that the actuary's calculations properly did, or properly should have included not only these items, all of which are "savings" of one kind and another, but also the withholdings for railroad retirement and federal income taxes—neither of which is in any sense a "contribution" to his wife and children.

3. The error challenged here is in the Supreme Court's opinion, not in the Trial Court's instructions.

The *Allendorf* case will be cited—and indeed, it already has been cited in *Wawryszyn* v. *Illinois Central R. Co.*, 10 Ill. App. 2d 394, 407, 408, 135 N.E. 2d 154, at 160, 161, not for the correct principles stated in the trial court's instructions, but rather for the incorrect principles stated in the opinion that "contributions" includes savings wage deductions, tax withholdings and all gross earnings other than personal expenses; that contributions to a minor dependent may be projected not only during the years of minority, but for the entire expected lifetime of the father; and that pecuniary contributions to his widow would continue unabated after he had retired. These are the respects in which the decision below is squarely in conflict with the decisions cited at p. 8 of the petition for certiorari. It was not open to the Illinois Supreme Court to make a choice to admit proof of actuarial computations on a basis contrary to that established by this Court and the Courts of Appeal for the Sixth, Seventh and Eighth circuits. The conflict created by the decision below on the very important issue of the proper method of assessing damages in an F.E.L.A. death case can only be resolved by review by this Court.

We respectfully submit that certiorari should be granted in this case and the decision below reversed.

Respectfully submitted,

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